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No. 96-1444

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

SUPREME COURT
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PEDRO ARIAS,
Petitioner,
v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
MARGARET VENTURI
Supervising Deputy Attorney General
WARD A. CAMPBELL, Assistant
Supervising Deputy Attorney General
ALISON ELLE ALEMAN
Deputy Attorney General
Counsel of Record
1300 I St., Suite 125; P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5164
Counsel for Respondent

CAPITAL CASE

QUESTIONS PRESENTED

1. Does a determination by the state's highest court that trial courts need not engage in comparative analysis of the responses of excluded minority venire members violate the holding of *Batson v. Kentucky* and the equal protection clause of the Fourteenth Amendment?

2. Do the due process right to an impartial jury and the Eighth Amendment requirement of reliability in capital sentencing prohibit allowing the same jury which has just convicted a defendant of murder in the guilt trial to then adjudicate in a penalty trial whether the defendant is guilty of other uncharged crimes?

3. Does California's 1978 Capital Punishment Statute violate the Eighth Amendment because it fails to narrow the class of offenders who are eligible for the death penalty?

LIST OF PARTIES

Petitioner Pedro Arias is a prisoner incarcerated under judgment of death at the California State Prison at San Quentin, California. Respondents are James H. Gomez, Director, California Department of Corrections, Daniel Vasquez, Warden of the California State Prison at San Quentin, and the People of the State of California.

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OPINION AND ORDER BELOW

The opinion of the California Supreme Court is reported at 13 Cal.4th 92 (1996). A copy is attached to the petition as petitioner's Appendix A, pages one through one hundred twenty-eight. A copy of the order denying rehearing is attached to the petition as petitioner's Appendix B.

STATEMENT OF JURISDICTION

This Court's jurisdiction to grant certiorari is properly invoked under 28 U.S.C. section 1257, subdivision (a). The opinion of the California Supreme Court was filed April 11, 1996, and that court denied petitioner's timely petition for rehearing on July 10, 1996. Pet. Apps. A & B. On October 1, 1996, Associate Justice O'Connor granted petitioner's request for an extension of time within which to file this petition to and including November 7, 1996. Pet. App. C. Thereafter, petitioner's first petition for a writ of certiorari, dated November 7, 1996, was submitted to this Court for filing. However, petitioner did not submit a declaration of indigency with the petition. On November 20, 1996, petitioner's counsel submitted a motion for leave to file in forma pauperis without a declaration of indigency, which informed the Court that petitioner refused to cooperate with counsel and sign the declaration. Pet. App. C-1. Petitioner's motion was denied by this Court on January 6, 1997. Pet. App. C-2. On January 7, 1997, petitioner's counsel confirmed by letter this Court's permission to refile the petition, without in forma pauperis status, within sixty (60) days from January 6, 1997. Pet. App. C-3. The instant petition was submitted by mail by petitioner on March 7, 1997, and was filed by this Court on March 13, 1997.

CONSTITUTIONAL PROVISIONS

Petitioner is invoking the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. Petitioner has set forth said amendments in Appendix D, attached to his petition.

STATEMENT OF THE CASE

On November 20, 1989, a jury convicted petitioner Pedro Arias of the May 23, 1987, first degree murder, California Penal Code sections 187, 189,[1] of Jon Waltrip, and robbery, section 211, of Jon Waltrip, Tina Cheatham, and Larry Galvin. The jury also found true the special circumstance under California's 1978 death penalty laws that the murder was committed during the commission of a felony, robbery, section 190.2, subdivision (a)(17); and found true the allegation that petitioner was personally armed with a knife within the meaning of section 12022, subdivision (b), in the commission of these charges. The jury also convicted petitioner of the June 5, 1987, kidnap, section 207, subdivision (a), robbery, section 211, kidnap for robbery, section 209, subdivision (b), forcible penetration, section 289, subdivision (a), attempted forcible sodomy, sections 664/286, subdivision (c), forcible oral copulation, section 288a, subdivision (c), and forcible rape, section 261, subdivision (2), of Judy N.; and of the June 5, 1987, robbery, section 211 of Linda McCord. The jury also found true allegations that petitioner personally used a firearm within the meaning of section 12022.3, subdivision (a), in the commission of the June 5, 1987, offenses.

On December 21, 1989, following a penalty trial, the jury returned its verdict fixing the penalty at death.

On February 22, 1990, the trial court denied petitioner's automatic motion for modification of the verdict, section 190.4,

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1. Hereinafter, all statutory references are to the California Penal Code unless otherwise indicated.

subdivision (e), and sentenced petitioner to death for the first degree murder, plus an aggregate determinate term of sixty-nine years, four months, for all remaining counts.

Petitioner's appeal to the Supreme Court of California was automatic. On April 11, 1996, that court was convinced after "careful review of the record" that "the trial was fundamentally fair and its determinations reliable. No basis for reversal appears." In a majority opinion of six justices, plus one concurring opinion, all justices joined in the affirmance. *People v. Arias,* 13 Cal.4th 92 (1996), hereinafter "*Arias*," Pet. App. A 1-126. The court denied rehearing on July 10, 1996. Pet. App. B.

STATEMENT OF FACTS

The facts of the offenses, which are not pertinent to the issues raised in the within petition for certiorari, are set forth in detail in the California Supreme Court opinion attached to the petition as Appendix A, pages one through twenty, and are incorporated herein by reference. In summary, on May 23, 1987, petitioner robbed a Beacon gas station at knifepoint and stabbed clerk John Waltrip to death. Subsequently, on June 5, 1987, petitioner kidnapped, raped, robbed and otherwise sexually assaulted June N. The specific facts pertaining to each issue are addressed within the arguments in opposition to this petition.

REASONS FOR DENYING THE WRIT

ARGUMENT

I.

THE CALIFORNIA SUPREME COURT DID NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Petitioner contends that California Supreme Court erred in concluding that the trial court has no obligation to perform a comparative analysis in deciding the validity of an equal protection claim pursuant to *Batson v. Kentucky,* 476 U.S. 79 (1986) ("*Batson*").[2] He argues that California defendants cannot show that they have been denied equal protection under *Batson* because of the California Supreme Court's holding. Arg. I at Pet. 11-16. Respondent disagrees.

Initially, this Court should reject, as procedurally barred, petitioner's claim of federal constitutional error involving the rights to a fair trial and to equal protection of the laws. In making his objection, petitioner's counsel said, "At this time we'd like to make a motion under *People v. Wheeler* on the basis of the systematic exclusion of two different minority groups, blacks and also Mexicans, which my client is Mexican, himself." (RT 3867.) The defense did not invoke equal protection principles, did not cite *Batson* nor any other federal case, and did not object as the trial

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2. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court held that the use of peremptory challenges to exclude potential jurors on account of their race violates the federal Constitution and that equal protection principles do apply within the confines of a particular trial. *Batson* also established standards for resolving claims of discrimination in the jury selection process. (*Id.* at 95-98.)

court considered and applied the *Wheeler*[3] format. Equal protection claims must be presented in the state trial court or will be deemed waived. This is true even if the defendant presented all the facts in connection with an objection on other grounds, if he has failed to bring the equal protection claim to the attention of the court. *Picard v. Connor,* 404 U.S. 270, 277-78 (1971); *Holland v. Illinois,* 493 U.S. 474, 480, 482-83 (1990); see also *People v. Garceau*, 6 Cal.4th 140, 173 (1993); *People v. McPeters*, 2 Cal.4th 1148, 1174 (1992); cf. *Teague v. Lane,* 489 U.S. 288, 298 (1989). Therefore, petitioner's specific reliance on the representative cross-section rule and *Wheeler*, coupled with his failure to suggest an equal protection and/or *Batson* basis for his objection, preclude him from raising independent federal grounds for his objection at this time. At any rate, petitioner's equal protection claim lacks merit and should be rejected because, as discussed below, the trial court's finding that there was no improper use of the peremptory challenges exercised by the prosecutor is supported by the record.

In *Purkett v. Elam*, 514 U.S. 765 (1995), this Court recently explained its *Batson* jurisprudence:

> . . . [O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If a race neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination. [Citations.]

Id. at 766-67.

Petitioner argues that the California Supreme Court's opinion in the instant case "essentially vitiates step 3 of the *Purkett* standard" by permitting California trial courts to ignore factors which show that a prosecutor has excluded Black and Hispanic

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3. *People* v. *Wheeler*, 22 Cal.3d 258 (1978).

jurors allegedly because of responses they gave, but has permitted White jurors with the same responses to serve. Pet. 14. Petitioner is mistaken.

This Court in *Batson v. Kentucky* held:

> Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging [B]lack jurors. . . . [T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. [Citations.]

Id. at 97.

> The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. [Footnote omitted.] The trial court then will have the duty to determine if the defendant has established purposeful discrimination. [Footnote omitted.]

Id. at 98.

The prosecutor's reasons must be "clear and reasonably specific" and must provide "legitimate reasons for exercising the challenges." *Id.* at 98, n. 20.

> Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. [Citation.]

Id. at n. 21.

The California Supreme Court reviewed the voir dire in light of these requirements and found:

> With these standards in mind, we conclude that the instant trial court's ruling satisfies *Wheeler/Batson* standards. Certain aspects of the trial court's findings were neither necessary nor relevant, since a *Wheeler* violation does not require "systematic" discrimination

> [citation] and is not negated simply because both sides have dismissed minority jurors or because the final jury is "representative." However, after observing the relevant voir dire explanations, the court also found in effect that the reasons offered for each individual suspect excusal, including those of panelists Barber, Campos, and Nevarez, were both genuine and acceptably nondiscriminatory.
>
> The record discloses no basis for suspicion that the court's effort to evaluate the prosecutor's good faith in this regard was anything other than "sincere and reasoned." [Citation.] Hence, if the responses given by the individual excused panelists support the court's findings, we must accept them.

People v. Arias, 13 Cal.4th at 137-38.

In *People v. Johnson*, 47 Cal.3d 1194 (1989), the California Supreme Court found that an experienced trial court judge, who had seen and heard the entire voir dire proceeding by which the defendant's jury was selected, was sensitive to the manner in which peremptory challenges were used and, accordingly, properly found no improper use of the peremptory challenge by the prosecutor. "Under these circumstances we see no good reason to second-guess [the trial court's] factual determination." *Id.* at 1221. The *Johnson* Court further noted that, "if we [the California Supreme Court] cannot trust trial courts to do their job fairly, we might as well close up shop . . . ." *Id.* at 1219, citing *People v. Trevino,* 39 Cal.3d 667, 704, n. 4. (1985) (Kaus, J., dissenting).

Further, the use of comparative analysis to evaluate the bona fides of the prosecutor's peremptory challenges does not take into account the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar. In its disapproval of *People v. Trevino*, 39 Cal.3d 667, the California Supreme Court in *People v. Johnson*, 47 Cal.3d 1194, stated that comparisons are one-sided since they ignore the characteristics of the other jurors against whom the

prosecutor also exercised peremptory challenges. Furthermore, it is unrealistic to expect a trial judge to make such a detailed review mid-trial or during a two-month voir dire. *Id.* at 1220.

The *Johnson* Court further stated:

> Trial lawyers recognize that it is a combination of factors rather than any single one which often leads to the exercise of a peremptory challenge. In addition, the particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box. It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view. If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid jurors. However, if one or more of the supposed favorable or strong jurors is excused for cause or peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain. These same considerations apply when considering the age, education, training, employment, prior jury service, and experience of the prospective jurors.
>
> It is also common knowledge among trial lawyers that the same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the particular challenge and the number of challenges remaining with the other side. Near the end of the voir dire process a lawyer will naturally be more cautious about 'spending' his increasingly precious peremptory challenges. Thus at the beginning of voir dire the lawyer may exercise his challenges freely against

> a person who has had a minor adverse police contact and later be more hesitant with his challenges on that ground for fear that if he exhausts them too soon, he may be forced to go to trial with a juror who exhibits an even stronger bias. Moreover, as the number of challenges decreases, a lawyer necessarily evaluates whether the prospective jurors remaining in the courtroom appear to be better or worse than those who are seated. If they appear better, he may elect to excuse a previously passed juror hoping to draw an even better juror from the remaining panel.
>
> It should be apparent, therefore, that the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror which on paper appears to be substantially similar. The dissent's attempt to make such an analysis of the prosecutor's use of his peremptory challenges is highly speculative and less reliable than the determination made by the trial judge who witnessed the process by which the defendant's jury was selected. It is therefore with good reason that we and the United States Supreme Court give great deference to the trial court's determination that the use of peremptory challenges was not for an improper or class bias purpose. As stated in *Batson*: "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." [Citation.]

People v. Johnson, 47 Cal.3d at 1220-21.

The California Supreme Court's deference to the trial court was proper under *Batson*. As a practical matter, a trial judge, in determining whether a prospective juror has been challenged by the prosecution on a racial basis in violation of the United States Constitution, *see Batson, supra,* has an obligation to weigh the evidence and assess the credibility of witnesses. In short,

the trial judge is a factfinder. If from the evidence he believes that the prosecutor exercised peremptory strikes to exclude venirepersons based upon racial considerations, it is his duty to so find and to provide appropriate relief. This Court and the State Courts of Appeal are principally reviewing courts. They should not substitute their judgments of witnesses' credibility and evidentiary weight for those of the factfinder, but should affirm those judgments whenever the record discloses sufficient evidence in their support.

A prosecutor's statement alone might not be completely dispositive. The trial judge must gauge his credibility as in any other fact finding enterprise. Further, interjuror comparisons may be probative on the issue, but should be advanced before the trial court.[4/]

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4. Petitioner relies upon *United States v. Chinchilla,* 874 F.2d 695, 699 (9th Cir. 1989) in arguing that any disparate treatment between jurors is strongly suggestive of bias. Pet. 12. Any reliance upon this 9th Circuit holding is not dispositive in this case:

> . . . The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.

Lockhart v. Fretwell, 506 U.S. 364 (1993) (Thomas, J., concurring); *Burks v. Borg*, 27 F.3d 1424, 1428 (9th Cir. 1994); *Arizonians for Official English* v. *Arizona*, __U.S.__, 117 S.Ct. 1055, 1064, fn. 11 (1997); see also *People v. Dunn*, 40 Cal.App.4th 1039, 1050-51 (1995).

Furthermore, *Chinchilla* is hardly persuasive authority. Unlike the California Supreme Court's decision in *Johnson,* the *Chinchilla* opinion offers no analysis to support its comparative analysis approach. As authority, it relies on the Califnia Supreme Court's opinion in *People v. Hall,* 35 Cal.3d 168 (1983). To the extent *Hall* actually relied upon any comparative analysis, it was essentially disavowed by the California Supreme Court in *People v. Johnson,* 47 Cal.3d at 1218-22.

A reviewing court should reverse a trial court's findings only when they are not supported by sufficient evidence. If the trial judge was not urged to make, and did not make, a finding based upon a comparison analysis in deciding the issue whether the prosecutor's neutral explanations were rebutted or impeached at the *Wheeler/Batson* hearing with evidence that unchallenged veniremen also possessed the same purportedly undesirable characteristics, this Court should not undertake this fact-finding task or reconsider this circumstance in reviewing the trial judge's findings. .

The California Supreme Court generally adhered to these principles in reviewing petitioner's challenges to voir dire. It properly concluded that the "instant trial court's ruling satisfies *Wheeler/Batson* standards." *People v. Arias,* 13 Cal.4th at 137.

In summary, California prosecutors and trial judges have been leaders in the effort to eliminate group bias as a factor in criminal jury trials. That is evident in the extensive exposition of reasons which the prosecutor provided in support of his challenges in this case. For each one of the three prospective jurors whose exclusion is in issue here, the prosecutor gave a large number of neutral reasons for exercising a challenge, and at least several of those reasons are objectively verifiable from the written record. No further comparative review was requested or argued. We respectfully submit that petitioner's complaint is nothing more than an invitation for this Court to "micro-manage" the jury selection process in California. *People v. Johnson*, 47 Cal.4th at 1219-22. We submit that it would be totally inappropriate for this Court to substitute itself as the factfinder on the credibility and bona fides of the trial prosecutor.

II.

THE TRIAL COURT PROPERLY DENIED PETITIONER'S MOTIONS FOR SEPARATE JURIES AT THE GUILT- AND PENALTY-PHASE TRIALS

Petitioner further contends that the trial court's denial of his motions for separate juries to adjudicate the guilt phase and the penalty phase at trial violated his right to an impartial jury under the Sixth, Eighth and Fourteenth Amendments. Arg. II at Pet. 17-21. He bases this contention on the argument that the jury, which had just convicted him of capital murder, could not impartially determine the truth of prior unadjudicated and violent criminal acts and the weight to be given such aggravating factors in the jury's sentencing determination.

Both the California Supreme Court and this Court have already rejected this argument in numerous cases, despite petitioner's request to disregard them. *Buchanan v. Kentucky*, 483 U.S. 402, 414-21 (1987); *People v. Bacigalupo*, 1 Cal.4th 103, 135-36 (1991) (judgment vacated and remanded on other grounds, *Bacigalupo v. California* 506 U.S. __, 121 L.Ed.2d 5 (1992)); *People v. Gordon*, 3 Cal.4th 195, 252 (1992); *People v. Espinoza*, 3 Cal.4th 806, 827 (1992); *People v. Johnson*, 3 Cal.4th 1183, 1212-13 (1992); *People v. Balderas,* 41 Cal.3d 144, 204 (1985).

> We cannot agree. Even if a separate jury were empaneled to decide the penalty, it would be entitled to hear, in aggravation or mitigation, "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding," including "the existence of any special circumstance found true" at the guilt trial. (§ 190.3, subd. (a).) Under these circumstances, the strong legislative preference for a unitary jury outweighs any "supposed disadvantage" to defendant in the single-jury process. (See § 190.4, subd. (c).) [Citations.]

Id. at 204.

Accordingly, petitioner's argument is contrary to this Court's holding and should be rejected.

III.

PETITIONER LACKS STANDING TO CLAIM THAT THE CALIFORNIA STATUTORY SCHEME DOES NOT ADEQUATELY NARROW THE CATEGORIES OF DEATH-ELIGIBLE MURDERERS NOR DOES HE PRESENT A CASE OR CONTROVERSY FOR THIS COURT'S REVIEW SINCE PETITIONER WAS NOT SENTENCED TO DEATH UNDER THE CURRENT CALIFORNIA LAW AND SINCE THE STATE LAW APPLIED IN PETITIONER'S CASE ACTUALLY APPLIES TO A NARROWER CLASS OF MURDERERS

Petitioner further requests this court to review the adequacy of California's capital punishment law under the Eighth and Fourteenth Amendments. He argues that the California law does not genuinely narrow the class of persons eligible for the death penalty because it is so broad as to include "nearly every first degree murder." Arg. III at Pet. 21-29. However, review is not appropriate in this case since petitioner was not convicted and sentenced to death under the California law currently in effect. Indeed, he was actually tried under a law that is more selective of California murderers than the current statutory scheme described in the petition.[5]

As this Court is aware, under California law, a murderer is only death-penalty eligible when the murderer is convicted of first degree murder and the jury finds a special circumstance true. Petitioner asserts that the special circumstances that trigger eligibility "taken together . . . cover **virtually all** first degree murders." Pet. at 22 [emphasis added]. He argues that the drafters of California law intended the statute to apply to every murderer and that the "felony murder" special circumstance in particular fails to narrow the category of eligible felony-murderers.

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5. Respondent in no way concedes that the current California law fails Eighth Amendment eligibility standards. However, petitioner was not sentenced under that law.

Petitioner's own case is fatal to his claim. Petitioner was not tried and sentenced under the law he now attacks. Rather, his case was decided under a state law no longer in effect.

The problem with petitioner's argument is that an "intent to kill" was required for the felony murder special circumstances in his case. Although California law no longer requires an "intent to kill" for a felony murder special circumstance, such a mental state was required at the time petitioner murdered John Waltrip. Pet., App. A at 21-22. Thus, the felony murder special circumstance in petitioner's case did not simply duplicate the elements of first degree felony murder in California. Once the jury convicted petitioner of first degree murder, it was also necessary for the jury to find that petitioner intended to kill John Waltrip when he robbed him in order for petitioner to be death penalty eligible.

This Court has long settled that an intentional first degree felony murderer is an appropriate candidate for the death penalty under the Eighth Amendment. See, e.g. *Tison v. Arizona*, 481 U.S. 137, 157-58 (1987). Furthermore, there is nothing improper under Eighth Amendment jurisprudence for a jury to consider this factor in deciding the appropriate sentence. *Tuilaepa v. California,* 512 U.S. ___, 114 S.Ct. 2630, 2637 (1994). Whatever complaint petitioner has about the current California death penalty law, it is not a complaint that applies to his case since he was not tried under that law. His petition on this question should be denied. See, e.g. *Sochor v. Florida,* 504 U.S. 527, 537 (1992); *Arave v. Creech*, 507 U.S. 463, 476-78 (1993); *Walton v. Arizona*, 497 U.S. 639, 655-56 (1990).

CONCLUSION

Accordingly, for the reasons stated, respondent respectfully requests that the petition for writ of certiorari be denied.

Dated: May 2, 1997.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attor0ney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
MARGARET VENTURI
Supervising Deputy Attorney General
WARD A. CAMPBELL, Assistant
Suprevising Attorney General

ALISON ELLE ALEM'AN
Deputy Attorney General
California Bar No. 117566
Counsel of Record

Counsel for Respondent

AEA:lms
SA96XU0005